# Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22NCVC-121 OF 2011
VARGHESE GEORGE J
8 MARCH 2012

*Civil Procedure — Action — Disposal of action without trial — Disposal of case on point of law — Defendant applied for determination of two preliminary issues which would dispose of matter without necessity for full trial — Whether proviso to reg 11(2) of the Licensee Regulations 1990 applied — Whether case suitable for determination of issue of law — Whether defendant's application appropriate at this stage of proceedings — Rules of the High Court 1980 O 33 rr 2 & 5*

*Public Utilities — Electricity — Charges for electricity — Plaintiff claimed for recovery of unbilled usage of electricity at two premises for 27 months — Whether plaintiff's claim for back-charges for 27 months was unfair and unconscionable — Whether plaintiff's claim was brought pursuant to s 38(3) of the Electricity Supply Act 1990 ('Act') — Whether 'loss of revenue' pursuant to s 38(3) of the Act was hinged upon commission of an offence under s 37(1), (3) and (14) of the Act — Whether plaintiff pleaded commission of offence under s 37(1), (3) and (14) of the Act — Whether proviso to reg 11(2) of Licensee Regulations 1990 ('Regulations') applied — Electricity Supply Act 1990 ss 37(1), (3), (14) & 38(3) — Licensee Regulations 1990 reg 11(2)*

*Statutory Interpretation — Construction of statutes — Literal approach — Whether plain and precise words of s 38 of the Electricity Supply 1990 Act called for literal and strict interpretation to be given to that provision*

The plaintiff claimed that when it conducted an inspection of the meters which recorded the consumption of electricity at two of the defendant's premises, namely the premises at Bukit Mertajam and at Perai ('the two premises'), it had discovered that there had been meter tampering or interference. The plaintiff had then lodged a police report in respect of that discovery. Subsequently the plaintiff made a demand on the defendant to settle back-charges for unrecorded usage of electricity by the defendant on the two premises for the period September 2007–November 2009. When the defendant failed to settle the back-charges claimed, the plaintiff filed an action against the defendant for recovery of the back-charges. The defendant denied all the plaintiff's allegations save for the fact that there was an inspection at the two premises. The defendant averred that no police action had been taken against it or its

officers in respect of the alleged tampering or interference with the meters or for defrauding the plaintiff. The defendant counterclaimed. By way of this counterclaim, the defendant sought a declaration that the plaintiff's claim for back-charges for the prior 27 months was unfair and unconscionable. After this action was set down for trial the defendant filed the present application for the determination of two preliminary issues pursuant to O 33 rr 2 and 5 of the Rules of the High Court 1980 ('RHC 1980') on the grounds that these issues would dispose of this matter without the necessity for a full trial. The two issues raised were concerned with whether the proviso to reg 11(2) of the Licensee Regulations 1990 ('the Regulations'), which limited any retrospective adjustment to a period not exceeding three months from the date the defendant was informed it was undercharged, applied to the present case. The plaintiff cited s 38(3) of the Electricity Supply Act 1990 ('the Act') and submitted that since the action was brought pursuant to s 38(3) of the Act, the three months limitation in the proviso to reg 11(2) of the Regulations did not apply. The plaintiff further submitted that the 27 months' back-charges equated to the loss of revenue suffered by the plaintiff during that period and the defendant was liable to meet that loss. The plaintiff also raised a preliminary objection as to the appropriateness of the defendant's application.

**Held**, entering judgment for the plaintiff in the sum of RM1,048,369.20 with costs of RM15,000:

(1) This court found that it was not inappropriate to consider and determine the two issues posed by the defendant even at this stage of the proceedings. An application under O 33 r 2 of the RHC 1980, which was in the genre of procedures open to the court to expeditiously make a determination and that would have the effect of substantially disposing the matter before the court, could be made at any stage of the proceedings. The salient facts of the present case were not in serious dispute or controversy. Accordingly it was appropriate to allow a determination to proceed under O 33 r 2 of the RHC 1980 (see paras 10–13).

(2) The plain and precise words of s 38 of the Act called for a literal and strict interpretation to be given to that provision. According to the plain and unambiguous statutory words used any recovery of 'loss of revenue' pursuant to s 38(3) of the Act was hinged upon the commission of an offence under s 37(1), (3) and (14) of the Act. Without securing a conviction of that nature the plaintiff's claim for the recovery of the 27 months of back-charges was not sustainable in law. The plaintiff had not alleged in its statement of claim that the claim was founded upon or brought pursuant to s 38(3) of the Act. There was no averment by the plaintiff that the defendants or its servants were responsible for the tampering of the meters at the two premises or of them committing an offence under s 37(1), (3) and (14) of the Act. It was trite law that a party

was bound by its pleadings. Thus, the plaintiff's claim for all intents and purposes was a claim for unbilled or undercharged usage of electricity per se (see paras 16–18, 25–26 & 28).

(3) Taken in its entirety, reg 11 of the Regulations, by the words and details spelt out there, was a specific provision covering all situations where an undercharge or overcharge of electricity arose and this included cases that involved meter inaccuracy or incorrect meter reading. Thus proviso 11(2) of the Regulations, which limited any retrospective adjustment to a period not exceeding three months from the date the defendant was informed of the undercharge, applied to the present case. As such, the plaintiff was only allowed to claim back-charges for the two premises for the three months prior to 11 December 2009, as liability for that period had been conceded and admitted by the defendant. The total sum payable by the defendant as the judgment sum was thus quantified as RM1,048,369.20 with interest of 4%pa from the date of judgment until full settlement (see paras 21–23 & 29–33).

**[Bahasa Malaysia summary**

Plaintif mendakwa bahawa apabila ia menjalankan satu pemeriksaan meter-meter yang mencatatkan penggunaan elektrik di dua premis defendan, iaitu premis di Bukit Mertajam dan di Perai ('kedua-dua premis'), ia mendapati terdapat usikan atau gangguan pada meter. Plaintif telah membuat laporan polis berhubung penemuan tersebut. Seterusnya plaintif meminta defendan membayar caj kebelakangan bagi penggunaan elektrik yang tidak direkodkan oleh defendan di kedua-dua premis bagi tempoh September 2007 hingga November 2009. Apabila defendan gagal untuk menyelesaikan caj kebelakangan yang dituntut, plaintif telah memfailkan tindakan terhadap defendan bagi mendapatkan caj kebelakangan. Defendan menafikan semua tuduhan plaintif kecuali fakta bahawa terdapat suatu pemeriksaan di kedua-dua premis. Defendan menegaskan bahawa tiada tindakan polis telah diambil terhadap atau terhadap pegawai berkenaan dengan dakwaan penyalahgunaan atau gangguan dengan meter-meter atau kerana menipu plaintif. Defendan menuntut balas. Dengan cara tuntutan balas ini, defendan memohon satu deklarasi bahawa tuntutan plaintif untuk mengembalikan caj bagi 27 bulan kebelakangan adalah tidak adil dan terlalu besar. Selepas tindakan ini telah ditetapkan untuk perbicaraan, defendan memfailkan permohonan semasa bagi menentukan dua isu awal menurut A 33 kk 2 dan 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas alasan bahawa isu-isu ini akan melupuskan perkara ini, tanpa perlu untuk percubaan penuh. Kedua-dua isu-isu yang dibangkitkan adalah berkenaan dengan sama ada proviso kepada peraturan 11(2) Licensee Regulations 1990 ('Peraturan-Peraturan'), yang mengehadkan apa-apa pelarasan retrospektif untuk tempoh tidak melebihi tiga bulan dari tarikh defendan telah dimaklumkan telah terkurang, terpakai kepada kes ini. Plaintif menyebut s

38(3) Akta Bekalan Elektrik 1990 ('Akta') dan menghujahkan bahawa memandangkan tindakan dibawa di bawah s 38(3) Akta tersebut, had masa tiga bulan dalam proviso kepada peraturan 11(2) Peraturan-Peraturan tersebut tidak terpakai. Plaintif seterusnya menghujahkan bahawa caj kebelakangan 27 bulan yang disamakan dengan kerugian hasil yang dialami oleh plaintif dalam tempoh tersebut dan bahawa defendan adalah bertanggungjawab untuk memenuhi kerugian tersebut. Plaintif juga membangkitkan bantahan awal kepada kesesuaian permohonan defendan.

**Diputuskan**, membenarkan penghakiman untuk plaintif berjumlah RM1,048,369.20 dengan kos RM15,000:

(1) Mahkamah ini mendapati bahawa ia tidak sesuai untuk mempertimbangkan dan menentukan dua isu yang ditimbulkan oleh defendan walaupun pada peringkat prosiding. Suatu permohonan di bawah A 33 k 2 KMT, yang berada dalam genre prosedur terbuka kepada mahkamah untuk segera membuat penentuan dan yang akan mempunyai kesan besar melupuskan perkara sebelum mahkamah, boleh dibuat di mana-mana peringkat prosiding tersebut. Fakta-fakta penting kes ini tidak dalam pertikaian atau kontroversi yang serius. Oleh itu, adalah wajar untuk membenarkan keputusan untuk meneruskan di bawah A 33 k 2 KMT 1980 (lihat perenggan 10–13).

(2) Perkataan-perkataan yang jelas dan tepat s 38 Akta yang memerlukan kepada tafsiran literal dan ketat untuk diberikan kepada peruntukan tersebut. Menurut perkataan-perkataan statutori yang jelas digunakan, apa-apa tuntutan mendapatkan balik 'loss of revenue' menurut s 38(3) Akta tersebut telah bergantung kepada pelakuan suatu kesalahan di bawah s 37(1), (3) dan (14) Akta tersebut. Tanpa mendapatkan suatu sabitan sifat tuntutan plaintif bagi mendapatkan balik caj kebelakangan 27 bulan tidak mampan dalam undang-undang. Plaintif tidak menyatakan dalam penyataan tuntutan bahawa tuntutan tersebut berdasarkan kepada atau dibawa di bawah s 38(3) Akta tersebut. Tidak ada hujahan oleh plaintif bahawa defendan atau pembantunya bertanggungjawab mengusik meter di kedua-dua premis atau mereka melakukan kesalahan di bawah s 37(1), (3) dan (14) Akta. Ia adalah undang-undang tetap bahawa pihak-pihak terikat dengan pliding. Oleh itu, tuntutan plaintif bagi semua maksud dan tujuan adalah suatu tuntutan bagi penggunaan yang belum diperoleh atau caj elektrik terkurang semata-mata(lihat perenggan 16–18, 25–26 & 28).

(3) Dilihat secara keseluruhannya, peraturan 11 Peraturan-Peraturan, melalui perkataan-perkataan dan butir-butir yang dinyatakan dalamnya, adalah satu peruntukan tertentu yang meliputi semua keadaan di mana caj kurang atau caj eletrik yang terlalu mahal elektrik dan ini termasuklah kes-kes mengenai ketidaktepatan meter yang terlibat atau pembacaan

meter yang salah. Oleh itu, proviso 11(2) Peraturan-Peraturan, yang mengehadkan apa-apa pelarasan retrospektif untuk tempoh tidak melebihi tiga bulan dari tarikh defendan telah dimaklumkan mengenai caj kurang terpakai dalam kes ini. Oleh itu, plaintif hanya dibenarkan untuk menuntut kembali bayaran untuk kedua-dua premis bagi tiga bulan sebelum 11 Disember 2009, sebagai liabiliti bagi tempoh yang telah diakui dan diterima oleh defendan. Jumlah wang yang dibayar oleh defendan sebagai jumlah penghakiman itu kuantitinya adalah RM1,048,369.20 dengan faedah 4% setahun dari tarikh penghakiman sehingga penyelesaian penuh (lihat perenggan 21–23, 29–33).]

**Notes**

For cases on charges for electricity, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2188–2189.

For cases on disposal of action without trial, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 139–168.

For cases on literal approach, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1826–1855.

**Cases referred to**

*Fothergill v Monarch Airlines Ltd* [1980] 3 WLR 209, HL (refd)

*Fulcrum Capital Sdn Bhd v Dato' Samsuddin Abu Hassan & Ors* [2000] MLJU 610; [2001] 5 CLJ 73, HC (refd)

*Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149, HC (refd)

*Premium Vegetable Oils Sdn Bhd v ICG Systems Sdn Bhd & Ors* [2006] 7 MLJ 39, HC (refd)

*TNB v Takatronics (M) Sdn Bhd and 2 Ors* (unreported)

*Wong Kwi Fong v Tenaga Nasional Bhd* [2010] MLJU 1135; [2012] 1 CLJ 285, HC (folld)

*Wong Pot Heng & Anor v Zainal Abidin Putih & Anor* [1990] 2 MLJ 410; [1990] 1 CLJ (Rep) 312, SC (refd)

**Legislation referred to**

Electricity Supply Act 1990 ss 37, 37(1), (3), (3)(e), (14), 38, 38(3), (4), (5)

Licensee Regulations 1990 reg 11, 11(2), (2)(a), (2)(b), (2)(c)

Rules of the High Court 1980 O 14A, O 33 rr 2, 5

*SC Lim (Ong Wee En with him) (Sharizat Rashid & Lee) for the plaintiff.*
*Eugene Jeyaraj William (Rueben Williams) for the defendant.*

**Varghese George J:**

GROUNDS OF DECISION (ENCLOSURE 9/WRIT)

**[1]** This action had been set down for trial. On the first day of the trial,

counsel for the defendant informed that he had just filed an application ('encl 9') for a determination of two issue pursuant to O 33 rr 2 and 5 of the Rules of the High Court 1980 ('RHC'), which determination, it was submitted, would assist in the disposal of the issue in contrversy between the parties, without the necessity of a full trial. Counsel for the plaintiff was not averse to an adjournment of the trial and for encl 9 to be dealt with first.

BACKGROUND

**[2]** In the statement of claim filed in this action, the plaintiff claimed that:

(a) They had supplied electricity to two premises of the defendant, namely:

(i) under Account No 231–0317656–10 for the premises at Plot 55 (A) Mukim 13, Taman Perindustrian Bukit Minyak, Bukit Mertajam; and

(ii) under Account No 0231–00316814–01 for the premises at Plot 553, Lorong Perusahaan 4, Perai.

(b) On 19 November 2009 an inspection was conducted on the meters which recorded the consumption of electricity at both the premises and it had been discovered — 'terdapat pengusikkan pada pepasangan meter-meter' ('tampering' or interference with the meter installation or the meter-itself).

(c) A police report was lodged by the plaintiff on 20 November 2009 in respect of that inspection and discovery.

(d) The plaintiff had subsequently on 14 December 2009 made a demand on the defendant to settle back-charges for the unrecorded usage of electricity for the period September 2007–November 2009:

(i) for Plot 55 (A), a sum amounting to RM7,088,706.08; and

(ii) for Plot 553 — RM1,210,902.86

The amounts claimed were based on calculations which relied on '... load profile pengguna elektrik' (profile of past electricity usage) of the defendant.

(e) The defendant had appealed against the aforesaid assessment of back-charges and the plaintiff had agreed to revise it downwards:

(i) for Plot 55 (A) to RM6,803,477.44; and

(ii) for Plot 553 to RM1,210,902.86.

(f) Despite demands, the defendant had failed to settle the back-charges claimed.

**[3]** The defendant in their statement of defence and counterclaim:

(a) denied all the allegations of the plaintiff, save that there was an inspection at the premises on 19 November 2009 by the plaintiff;

(b) place on record that the defendant had not been granted an opprtunity to independently test, the alleged 'faulty' meters;

(c) stated that following upon negotiations between the parties, the defendant had made a without prejudice offer to compromise and settle the plaintiff's claim by payment of RM3m but the plaintiff was not receptive of that overture by the defendant.

(d) stated further that no police action had been taken against the defendant, its officers or agents in respect of the alleged 'tampering'/interference with the meters or for 'defrauding' the plaintiff.

**[4]** By way of counterclaim, the defendant sought for a declaration that the plaintiff's claim for back-charges for prior 27 months was unfair, arbitrary and unconscionable.

The plaintiff response to that was that the 27 months back-charges equated to the loss of revenue suffered by the plaintiff during that period and that the defendant was liable to meet that loss.

*Enclosure 9*

**[5]** The two question posed in encl 9 for determination by the court were:

(a) Sama ada Regulation 11(2) Licensee Supply Regulations 1990 terpakai di dalam situasi di mana Defendan telah terkurang caj (undercharged) akibat meter elektrik yang tidak tepat atau tidak menunjukkan bacaan meter yang betul untuk membenarkan Plaintif membuat pelarasan ke belakang (retrospective adjustments) kepada akaun Defendan; dan

(b) Sama ada proviso kepada Regulation 11(2) Licensee Supply Regulations 1990 terpakai untuk menghadkan sebarang pelarasan ke belakang (retrospective adjustment) kepada tempoh tidak melebihi tiga (3) bulan daripada traikh Defendan telah diberitahu berkenaan terkurang caj (being undercharged).

Rendered in English, they read as follows:

(a) whether reg 11(2) Licensee Supply Regulations 1990 applied in a situation where the defendant had been undercharged as a result of meter inaccuracy or incorrect meter reading, to enable the plaintiff to make retrospective adjustments to the defendant's account; and

(b) Whether the proviso to reg 11(2) Licensee Supply Regulations 1990

applied to limit any retrospective adjustment to a period not exceeding three months from the date the defendant has been informed about being undercharged.

**[6]** The aforesaid questions were premised on two concessions made by the defendant, namely:

(a) the defendant's acknowledgement that the two electricity meters in question were either not recording the usage of electricity accurately or were providing an incorrect meter-reading at the premises; and

(b) the defendant's admission of liability to pay back-charges to the extent of three months unbilled usage prior to date of demand, only.

The concession (a) above was in other words, an admission as to the existence of 'faulty meters' at the premises but not as to any 'tampering' or interference with the meters.

The defendant was further willing to abandon their counterclaim if the two questions were answered in the affirmative.

**[7]** The corollary issue that arose for consideration was whether, even if the meters had been established on evidence to have been 'tampered' with, what would be the extent to which the plaintiff was entitled to recover back-charges for unbilled electricity consumed from the defendant.

The defendant's contention was that even in such a situation, it still nevertheless fell under an 'error of reading' of the meters and accordingly any recovery by the plaintiff was also limited to unbilled usage up to three months prior to the demand to pay back-charges.

The plaintiff on the other hand, citing s 38(3) of the Electricity Supply Act 1990 ('the Act') submitted that the three months limitation did not apply and the plaintiff was entitled to recover all 'revenue' that would have otherwise accrued to the plaintiff in such a case scenario.

**[8]** At this point it is pertinent to highlight that *s 38(3) of the Act was never referred to or pleaded in the statement of claim* at all, as the foundation of the plaintiff's claim for recovery of back-charges. Section 38(3) of the Act only featured in the submissions of the plaintiff's counsel. It was understandable therefore that the defendant also made no reference to s 38(3) of the Act in the two questions posed for determination.

## PRELIMINARY OBJECTION

### *Appropriateness of encl 9 application*

**[9]** Objection was raised by the plaintiff as to the appropriateness of the

defendant's application for the questions to be determined as preliminary issues. The basis of the objection were essentially three-fold, namely:

(a) the plaintiff's claim arose from *pengusikkan* meters ('tampering'), it was alleged;

(b) tThe claim was being brought pursuant to s 38(3) of the Act and therefore reg 11 had no place in such a context where the action was based on alleged 'tampering' of the meters; and

(c) the defendant had at one point expressed willingness to settle the claim for back-charges for a sum of RM3m and this should be held as an 'admission of debt' up to RM3m by the defendant, in any case.

**[10]** After considering the submission of the parties on this objection, I held that it was not inappropriate to consider and determine the two issues posed by the defendant even at this stage of the proceedings.

Firstly, in the plaintiff's plaint the description of the sum claimed, was '... jumlah penggunaan tenaga yang tidak direkodkan yang dihutangi oleh Defendan.' (para 13). The sum claimed was therefore for electricity consumption which had not been recorded (that is, in other words, unbilled or undercharged usage).

It was not alleged in the statement of caim that the claim was founded upon or brought pursuant to s 38(3) of the Act.

Secondly, there was no admission by defendant of liability up to RM3m, as was sought to be urged upon the court by the plaintiff. At para 9 of the statement of defence, it was candidly stated that the offer made was on a 'without prejudice' basis during negotiations with a view towards settlement and avoidance of litigation. In the paragraphs of the statement of defence that followed, the defendant elaborated on the stages in the 'negotiation' (paras 10, 11, 12 and 13) and how the plaintiff held firm with their claim for the full amount, notwithstanding. It cannot be gainsaid by the plaintiff that there was a settlement or 'admission' in such circumstances.

If there was an admission by the defendant up to RM3m as alleged by the plaintiff, one could have expected the plaintiff in this case to rush to sign judgment for RM3m first and then proceed to trial for the balance claimed. That was not the case here.

**[11]** Thirdly, with regard to O 33, r 2 and r 5 of the RHC, its scope and usefulness had been acknowledged by the courts to be wide. It was in the genre of procedures open to the court, like for example O 14A, which could be utilised to expeditiously, in appropriate situations, make a determination which would likely have the effect of substantially disposing the cause or matter

before the court. The issues could be of pure law or of fact alone or even of mixed questions of fact and law. It could also be made at any stage of the proceedings.

Order 33 r 2 of the RHC 1980 was in the following terms:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

**[12]** In *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149, Abdul Malik Ishak J (as he then was) after reviewing various relevant authorities (also citing His Lordship's previous judgment in *Fulcrum Capital Sdn Bhd v Dato' Samsuddin Abu Hassan & Ors* [2000] MLJU 610; [2001] 5 CLJ 73), although in the main advocating caution in the use of the O 33 r 2 procedure, yet approved that O 33 r 2 conferred on the court a wide discretionary power and *the overriding consideration to take into account was that the disposal of the application would result in a substantial saving of time and expenditure*. Of course, there ought not to be substantial disputes as to facts or that the claim or defence was one riddled with complexities where extrinsic evidence was required.

Similar sentiments were expressed by Ramly Ali J (as he then was) in *Premium Vegetable Oils Sdn Bhd v ICG Systems Sdn Bhd & Ors* [2006] 7 MLJ 39.

**[13]** Here, in this case, the salient facts, as borne out especially by contemporaneous document (and the pleadings too) of the plaintiff, were not in serious dispute or controversy, as will be discussed further below. Accordingly, it was my holding that it was appropriate to allow a determination to proceed under O 33 r 2 of the RHC.

## THE TWO SUBSTATIVE QUESTIONS

### *Statutory provisions*

**[14]** To begin with, it is necessary to have a proper perspective of the statutory scheme relevant to the questions at hand for determination.

The Act came into force on 1 September 1990 replacing the Electricity Act 1949. The major result of that change in the legislative framework was that the National Electricity Board (the predecessor of the plaintiff) which was established as a statutory body under the Electricity Act 1949, now was merely a 'licensee' under the Act.

Section 37 (Offences) and s 38 (Disconnection of Supply of Energy) were provisions found under Part IX (Offences and Penalties) of the Act.

Section 38(3), (4) and (5) is reproduced below:

> 38 Disconnection of Supply of energy
>
> (1) ...
>
> (2) ...
>
> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under section 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.
>
> (4) a written statement by an employee of the licensee duly certified by the licensee or any person authorized by the licensee specifying —
>
> (a) the amount of loss of revenue or the expenses incurred by the licensee; and
>
> (b) the person liable for the payment thereof.
>
> shall be prima facie evidence of the payment that has to be made by the consumer under subsection (3).
>
> (5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

**[15]** Regulation 11 Licensee Supply Regulations 1990 (a subsidiary legislation made under the Act), subsequent to amendments effected thereto by PU (A) 489/02 was in the following terms:

> (2) The reading of the consumer's meter shall be prima facie evidence of the amount of electricity consumed, provided that in the event a consumer has been undercharged or overcharged as a result of:
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> (a) meter inaccuracy;
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> (b) malfunctioning of the meter or its associated installation or part thereof;
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> (c) incorrect meter reading;
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> (d) Incorrect application of a meter multiplying constant;
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> (e) cross-connection of installation to different accounts; or
>
> (f) faulty installation.
>
> the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

Provided that the period for any retrospective adjustment shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

The same reg 11 before the aforesaid amendment (which came into effect on 14 December 2002) read as follows:

> (2) The reading of the consumer's meter shall be prima facie evidence of the amount of electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to faulty installation, the licensee may make a charge for the supply of energy.

*Analysis of s 38(3) of the Act*

**[16]** In my assessment, going by the plain and unambiguous statutory words used, the first and primary point to take note was that any recovery of Moss of revenue' pursuant to s 38(3) of the Act was hinged upon the commission of an offence under s 37(1), 37(3) and 37(14). A priori therefore, there must be a conviction first recorded against the defendant before any right to recover 'loss of revenue' could be taken or proceeded with by the plaintiff under s 38(3) of the Act. The plain and precise words of the legislation called for a literal and strict construction to be given to that provision. The significance of the fact that s 38 was found within Part IX of the Act (Offences and Penalties) could not be lightly dismissed either.

The canons of interpretation of statutes (including 'purposive' reading for example) can only be availed of where the terms or words employed by the legislature in the statute created a doubt and the court had to opt for one meaning to the exclusion of another or others. This was trite. (Supreme Court in *Wong Pot Heng & Anor v Zainal Abidin Putih & Anor* [1990] 2 MLJ 410; [1990] 1 CLJ (Rep) 312 per Mohd Azmi SCJ approving and applying the House of Lords decision in *Fothergill v Monarch Airlines Ltd* [1980] 3 WLR 209.) That was not the situation here.

**[17]** My brother Gunalan Muniandy JC in *TNB v Takatronics (M) Sdn Bhd and 2 Ors* (unreported) expressed a similar view to that I have expressed above, namely, that a civil claim under s 38(3) of the Act plainly required as a prerequisite, proof of the commission (more correctly stated, a conviction, I should say), of an offence under any of the three subsections of s 37 expressly set out there, namely s 37(1), 37(3) or 37(14).

The plaintiff's contention in argument, as noted above, was that their claim for 27 months of back-charges (or unbilled charges) was being pursued pursuant to s 38(3) of the Act. Even if that was so, it was still incumbent upon the plaintiff to produce evidence that the defendant, its officers or agents *had been*

*convicted* of any of the specified three types of *offences* under s 37 of the Act. Without securing a conviction of that nature the plaintiff's claim for the 27 months of back-charges was not sustainable in law.

**[18]** It should be noted that the word 'tampers' is only found in s 37(1) of the Act, while the 'dishonesty' alluded to in s 37(3), (particularly with reference to s 37(3)(e)), could, no doubt, encompass willful interference with meters recording electricity consumption. Similarly by s 37(14), causing damage to such consumption meters was an offence as well. The point however was that there would be no offence unless convicted, and if not convicted under any of those subsections of s 37 of the Act, the plaintiff's claim for all intents and purposes was a claim for unbilled or undercharged usage of electricity perse.

**[19]** The *second point to note* was that there was no definition of what constituted *loss of revenue* in the Act (or elsewhere for that matter in any related subsidiary legislation). It was therefore a vague, general term without certainty as to its extent or reach.

*Analysis of reg 11*

**[20]** Regulation 11 on the other hand held out that the reading recorded on the consumer's meter shall be deemed to be prima facie evidence of the electricity consumed *but* in a situation where such usage had been 'undercharged' or 'overcharged' on account of the six instances ((a)–(f)) therein set out, there could be effected retrospective adjustment provided it did not exceed a three month-period from the date the consumer was notified of such undercharge or overcharge.

Where there was an overcharge, the adjustment would be a credit given in favour of the consumer and where there was an undercharge, the licensee was entitled to recover the amount of unbilled usage.

Regulation 11(2) itself went on to further provide the specifics of how calculations of such adjustments/ back-charges ought to be premised upon. (... retrospective adjustments to the consumer's account in respect of consumption and demand for such period by *taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence* and other relevant circumstances to rectify such undercharged or overcharged situation).

The specifics as to how the quantum was to be derived as provided here was tantamount to plugging the gap for the absence of definition of 'loss of revenue' (in s 38(3) of the Act), as earlier noted by me.

Here and true enough, the irony was, that the plaintiff's claim in this instant action also used the same formula ('... load profile penggunaan elektrik' (profile of past electricity usage)) spelt out in reg 11(2) above.

**[21]** Taken in its entirety, reg 11, by the words and details spelt out there, in my reading of it, was a specific provision covering all situations where an undercharge or overcharge in the usage of electricity arose. A

I could not therefore agree with counsel for the plaintiff's submissions to the effect that reg 11 was merely a 'general' provision and s 38(3) was the 'special provision' in respect of undercharges (arising from *tampering*, that is) and hence the proviso limiting the recovery to three prior months of prior usage did not apply, according to her in a s 38(3) recovery action. B

**[22]** Onto then to another point. It was also indisputable that the consequential result of the commission of any offence under s 37(1), s 37(3) or s 37(14) would be a situation where one would be left with a 'meter inaccuracy' or 'incorrect meter reading'. Such scenario fell squarely within the instances contemplated in reg 11(2)(a) and (c), and possibly perhaps under (2)(b) (malfunctioning of the meter or its associated installation or part thereof), as well. C D

Regulation 11(2) and more significantly, the proviso thereto, in my view, extended to apply therefore, even if the situation obtaining was the result of the so called 'tampering', if one was to follow counsel for plaintiff's categorisation of such civil claims, which were brought pursuant s 38(3) of the Act E

**[23]** If it was to be the case that the civil claims made available under s 38(3) of the Act were intended not to be treated as an undercharge or overcharge under reg 11(2) and its proviso, it was my view that, then at least the drafters of the amendments to reg 11 (in 2002) who had an opportunity, should have expressly excluded s 38(3) situations from the applicability of the enlarged reg 11(2) when it was amended. That was not the case here. F

In this respects, I was in full agreement with the reasoning and interpretation on reg 11 made by my sister Noor Azian Shaari J in *Wong Kwi Fong v Tenaga Nasional Bhd* (now reported in; [2012] 1 CLJ 285) to the effect that, if that was the intention or the statutory scheme envisaged by the legislators, there ought to have been express words 'excluding tampering' (or maybe to be more accurate, 'excluding s 38(3) claims') in reg 11(2)(a) and (c) to exempt undercharge claims from the effect of the limiting proviso. In Justice Noor Azian's view reg 11(2)(a) should have then read 'meter inaccuracy (other than arising out of tampering)' and reg 11(2)(b) should have been set out as 'incorrect meter reading (other than inaccuracy arising out of tampering', if that was the legislative intent. Alternatively, even s 38(3) of the Act itself could have been drafted with an express qualification or exclusion from the effect of reg 11 (that is, in 'Notwithstanding any other …') terms. G H I

**[24]** My attention was nevertheless, drawn to the fact that an appeal against Noor Azian J's aforesaid judgment had been recently allowed by the Court of

Appeal. However no full grounds for the decision of the Court of Appeal was available. From the broad grounds issued by the Court of Appeal for their decision, it was discernable that the reversal could have been influenced by a finding of fact made there in that case by the High Court that the meter had been 'tampered' (which finding was not a subject of the appeal) and further that the claim was based on a written statement issued under s 38(4) of the Act, which had the effect of being conclusive of the amount claimed. These above factors, coupled With the more important fact — that the suit there (Shah Alam suit) was expressly brought under s 38(3) of the Act as set out in the statement of claim there, appear to have been the reasons, for the appeal being allowed by the Court of Appeal.

The appeal was in my reckoning, allowed based on the particular facts and the specific pleading which grounded the plaintiff's claim there to be specifically under s 38(3) of the Act.

**[25]** Returning then to the instant case, it bears repetition that nowhere in the plaintiff's statement of claim was there any allegation that the plaintiff's claim was brought specifically pursuant to s 38(3) of the Act following from a criminal act 'tampering'. The plaintiff's plaint only referred to a *pengusikkan meter* in generic terms.

**[26]** There was no averment by the plaintiff in the matter that the defendant or its servants or agents, were in any way responsible for the *pengusikkan* of the meter at the two premises nor for that matter, was there any suggestion, even remotely, of the commission of an offence under s 37(1), s 37(3) or s 37(14) of the Act or that criminal proceedings or prosecution had been commenced or were underway against the defendants, its agent or servants. If the offence was to bite there should have been named or identified the person alleged to have committed the act of tampering. The fact also remained there was no action taken by the police on the report lodged by the plaintiff on 20 November 2009.

**[27]** Most significantly, in my assessment was the unchallenged fact that the two notices issued by the plaintiff to the defendant on 19 November 2009, that is, on the date of inspection of the meters (as exhibited in encl 11 by the plaintiff), stated expressly:

> Hasil pengujian menunjukkan meter berkenaan tidak merekodkan bacaan penggunaan elektrik yang sebenar....

To be noted is that there was no claim of the now advocated 'tampering' or of any offence under s 37(1), s 37(3) or s 37(14) as the basis of the plaintiff's claim in this contemporaneous document issued immediately after the inspection of the meters in question. The matter complained of or noted there commonly for the two cases, squarely was one that fell within reg 11(2)(a) (*meter inaccuracy*) or (c) (*incorrect meter reading*) and the proviso applied imposing a limitation on

recovery of unbilled or undercharged usage to the immediate preceding three month period only.

CONCLUSION

**[28]** It was trite that a party was bound to and limited to its pleadings. In this case there was nothing in the statement of claim to state that the plaintiff's claim was founded on s 38(3) of the Act. In any event, there was no evidence of any conviction obtained under the three offences (s 37) which could have given rise to such a claim, if at all.

**[29]** Regulation 11(2) and its proviso was applicable for all types of meter inaccuracy or incorrect meter reading even in the case of a sustainable civil claim brought pursuant to s 38(3) of the Act. In any case, the plaintiff's first notice after the inspection on 19 November 2009 only adverted to the meters not providing accurate readings.

**[30]** In the final analysis, the two questions all boiled down to whether the plaintiff's recovery of unbilled usage at the two premises, *in the context and circumstances of this case with particular reference to the pleadings filed*, was subject to the proviso to reg 11(2) of the Licensee Supply Regulations 1990 which limited any retrospective adjustment to a period not exceeding three months from the date the defendant had been informed about the undercharge.

My conclusion was that the proviso in reg 11(2) applied. I was convinced that I would come to the same conclusion if the plaintiff's claim had proceeded to trial.

**[31]** My answer to the two questions was therefore in the affirmative for the reasons elaborated above.

**[32]** Following from the above, the plaintiff prayed for judgment to be entered against the defendant for the back-charges for both the premises for the three months period prior to 11 December 2009 as liability for that sum had been conceded and admitted by the defendant. The details of the quantum that constituted the three months of back-charges for unbilled usage at the two premises were available on the records before the court.

**[33]** After respective counsel had confirmed as amongst themselves, the relevant quantum involved, I ordered as follows:

(a) The defendant's counterclaim be struck out;

(b) There shall be judgment entered for the plaintiff against the defendant for:

(i) The total sum of RM1,048,369.20, and

(ii) Interest thereon at the rate of 4% pa from date of judgment until full settlement.

(c) The defendant to pay the plaintiff costs of RM15,000 overall for this proceedings.

*Judgment entered for plaintiff in sum of RM1,0486,369.20 with costs of RM15,000.*

Reported by Kohila Nesan